

further argues that appellant worked beginning in 2006 and that his employment activities were dissimilar employment rather than earnings. Counsel alleges that appellant's work was *de minimis* and was not required to be reported. He contends that appellant received repayment of a personal loan or return on investment income. Counsel further contended that there was no evidence that appellant was listed as a staff member from February 9, 2012 through September 10, 2013.

FACTUAL HISTORY

On November 8, 2011 appellant, then a 53-year-old welder, filed an occupational disease claim (Form CA-2) alleging that he developed left shoulder tendinopathy, impingement syndrome, and partial rotator cuff tear. OWCP accepted his claim for left shoulder rotator cuff tear on January 6, 2012.

Appellant underwent left shoulder arthroscopic repair on March 7, 2012 and OWCP placed him on the periodic rolls effective April 10, 2012.

On October 16, 2012 appellant completed a Form EN1032 and indicated that within the past 15 months he had worked at the employing establishment. He stated that he worked at the employing establishment in 2008. Appellant did not note any current employment. The Form EN1032 asked that appellant report all self-employment or involvement in business enterprises within the last 15 months, including operating a business and providing services in exchange for money, goods, or other services. The form also required him to report as his "rate of pay" what he was paid, including the value of such things as housing, meals, clothing, and reimbursed expenses, if they were received as part of his employment. Appellant was also required to report any work or ownership interest in any business enterprise. If he performed any duties in any business enterprise for which he was not paid, he must show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties he did, even if his work was for himself, a family member, or relative.

Appellant reported that he had not been self-employed or involved in any business enterprise during the previous 15-month period covered by the form. He also indicated that he had not performed any volunteer work for which any form of monetary or in-kind compensation was received.

Appellant underwent an arthroscopy on his left glenohumeral joint on December 14, 2012. On April 24, 2013 he underwent a laparoscopic suprascapular nerve decompression on the left.

On September 10, 2013 appellant again completed a Form EN1032 and indicated that he had not worked for any employer for the previous 15 months. In response to the same language listed on the October 16, 2012 Form EN1032, he indicated that he was not self-employed or involved in any business enterprise in the previous 15 months. Appellant stated that he did not perform any volunteer work for any form of monetary or in-kind compensation during the 15-month period.

In a Memorandum of DVD Review dated February 25, 2014, OWCP indicated that there were three DVDs reviewed which included copies of documents from appellant's claim file, and

an interview with appellant lasting for over two hours. This material was provided by a supervisory special agent of the employing establishment's criminal investigative service. The recordings dated November 15, 2013 began at 9:45 a.m. and ended at 12:02 p.m. Appellant was aware that he was being recorded and that the issue for discussion was his OWCP benefits for the previous 19 months

Appellant noted that he was a welder by trade and completed the eighth grade. He began work at the employing establishment on February 2, 2008. Appellant developed a shoulder injury in June 2008 due to overhead work and sought treatment in 2011 and 2012. He described his heart operations and back injuries. Appellant stopped working in February 2012 when the employing establishment withdrew his position. He believed that he could have continued working until his surgery, but there was no light-duty work available for him.

Appellant received OWCP benefits from February 2012 through October 2013. In response to questions from the investigating agents, he described AFH, owned and operated by his ex-girlfriend, E.H. Appellant indicated that they had been a couple for seven years until October 2012. He reported that he owns the AFH bought in 2006 for E.H. Appellant supplied \$30,000.00 for the home purchase and renovation.

Appellant lived at the house from approximately April to August 2006. From December 2006 through August 2007, he paid the mortgage and other bills on the house until AFH received patients and maintained earnings from her business. Beginning in August 2007, E.H. paid the mortgage for AFH as well as for appellant's living expenses at her home. Appellant asserted that the business is E.H.'s and she is the manager of the business, but the AFH is in his name. He alleged that E.H. applied for the state license and was responsible for following the state requirements. The AFH facility housed six patients.

Appellant was listed with the state as an employee of the AFH. He worked at the AFH six hours a day seven days a week with no pay until March 2012 or his first surgery. He worked every night after his employing establishment job, from 5:30 p.m. until 10:00 p.m. putting the patients to bed. Appellant also gave out breakfasts and lunches to the patients, and he got up in the middle of the night when patients screamed or to clean patients. While he did not receive a salary, appellant believed that his work for the AFH was worth approximately \$2,000.00 a month. While appellant worked at the AFH and received no salary, E.H. paid his household bills and he lived at her family home up to and after his first shoulder surgery in March 2012. Appellant did not believe that his activities constituted working as he was not receiving money.

Appellant also underwent continuing education for 40 or 60 hours a year, including in 2012, for certification for cardiopulmonary resuscitation, food handler's license, insulin shots, and dementia training. He also participated in a class to learn how to give shots for diabetes. E.H. paid for these classes.

In December 2012, before his second shoulder surgery, appellant moved back to AFH property in a separate building which he had built. He was not allowed to sleep in the caregivers' room. Following his December 14, 2012 operation, he slept on the AFH property at night, and relieved an employee at 9:00 p.m. Appellant distributed medication and sat in a chair from 9:00 p.m. to 11:00 p.m. when another employee would relieve him. He did not believe that

he was working. Appellant never drew a salary, he paid E.H. \$1,000.00 a month to live in the AFH property. He gave her \$500.00 every two weeks.

E.H. began returning his investment, in approximately November or December 2012. There was no contract between E.H. and appellant. As per the oral agreement, E.H. was to repay appellant \$1,000.00 a month. She paid him \$12,000.00 from December 2012 to 2013 which repaid the investment money.

Appellant and the investigators discussed the EN1032 forms. He did not consider E.H.'s repayment as income, but a repayment of money loaned. Appellant discussed this issue with the investigators as to whether this repayment was income. Although he had improved the AFH house, appellant did not believe that the money he received from E.H. was income. He agreed that in the EN1032 forms he denied earning income, or owning a business. Appellant alleged that he did not understand the questions on the form and answered to the best of his knowledge. Investigators told him that he was required to report any activity in a business enterprise in which he could earn money, including working for food, electricity, and cable. The investigator reviewed the EN1032 forms with appellant and requested that he read the form. Appellant did so, but denied understanding the form. He alleged that he had trouble understanding what he had read.

By decision dated March 13, 2014, OWCP found that appellant had forfeited his compensation benefits for the period February 10, 2012 through September 21, 2013 as he "knowingly" failed to report employment or earnings from the AFH. This decision was based on business documents and paperwork for the AFH which listed appellant as a certified caregiver and staff member. OWCP further noted appellant's admission that he was the owner of the residential property for the AFH and that he performed tasks including cleaning, preparing meals, and repairs for six hours a day seven days a week. OWCP found that appellant had failed to report his involvement in the AFH from February 10, 2012 through September 21, 2013 on EN1032 forms dated October 16, 2012 and September 10, 2013. Appellant, therefore, forfeited his right to compensation. OWCP determined that appellant had forfeited his compensation benefits in the amount of \$64,519.57 for the period February 10, 2012 through September 21, 2013.

In a telephone conversation dated April 4, 2014, appellant requested a copy of the investigative interview DVD. OWCP stated that, if he did not receive it in the copy request, then OWCP no longer had this DVD.

Appellant requested an oral hearing through a form dated April 7, 2014.

On April 10, 2014 OWCP received an investigative report from the employing establishment's criminal investigative service dated December 13, 2013 through February 10, 2014. This report stated that appellant was employed with the AFH while receiving compensation benefits. The report indicated that appellant was operating a privately-owned business out of his residence identified as an AFH. According to the report, appellant worked as a caregiver for the AFH from 2007 to 2013. He purchased a home with E.H. for the purpose of operating an AFH. Appellant funded the business startup costs and E.H. paid the monthly bills. E.H. had agreed to pay the mortgage payment once the business began earning profits. Appellant reported to investigators that he received income of \$12,000.00 from September 2012

to the present for working at the AFH. He admitted providing false information on the EN1032 forms and should have answered “yes” to the question of whether he was involved in a business and earned income in the past 15 months.

In a statement dated November 15, 2013, E.H. reported that she and appellant had purchased a house for the purpose of an AFH business and obtained a license in 2006. She related that appellant assisted with the cooking, repairs, and watching the residents. E.H. stated that she paid appellant \$1,000.00 a month for his assistance.

The record contains documentation that the AFH opened on May 24, 2007. The investigative report contains a handwritten document dated June 23, 2010 regarding a background check for appellant as an employee of the AFH. The licensing inspection noted that appellant was a significant other of the owner and listed him as Staff C on May 18, 2010. In an inspection report dated November 28, 2011, appellant was listed as staff member C on November 4, 2011.

On April 10, 2014 OWCP made a preliminary determination of an overpayment of compensation in the amount of \$64,519.57 for the period February 10, 2012 through August 21, 2013 as he forfeited his right to compensation benefits for this period. In a separate letter dated April 10, 2014, it stated that the decision dated February 10, 2012 was issued prematurely and was set aside. OWCP issued a new forfeiture decision dated April 10, 2014, finding that appellant had forfeited his right to monetary compensation for the period February 10, 2012 through September 21, 2013 as he knowingly failed to report earnings and employment activities on EN1032 forms dated October 16, 2012 and September 10, 2013. It further found that appellant was engaged in the business enterprise of AFH and was a certified caregiver and staff of The Caring Place, and performed work activities within the business for the 14-month period covered by the signed CA-1032s. Counsel requested an oral hearing and a copy of all investigative reports.

Appellant testified at the oral hearing on November 12, 2014. He contended that he had owned the AFH property since 2005. Appellant’s goal was to open an AFH, The Caring Place, with his ex-girlfriend. This business was licensed in 2006. E.H. repaid appellant \$12,000.00 at \$1,000.00 a month after their relationship ended in October 2012. Appellant resided at her home until April 2013. He then moved into a free-standing room in the property of AFH. Appellant testified that he did not work after his April 2013 surgery until June 2013 when he began to volunteer at AFH. He sat at the computer, gave residents snacks, and passed out medications. Appellant alleged these tasks took 15 minutes. He noted that in 2006 he washed dishes, cooked, cleaned, and repaired the house. Appellant also attended classes to be certified as a caregiver. He returned to work at the employing establishment in October 2013.

Appellant submitted a statement asserting that he sustained a closed-head injury when he was five years old. He contended that he had difficulty reading and understanding written material and that he only completed the eighth grade. Appellant asserted that he did not recall receiving his Miranda rights from investigators, that investigators did not inform him that he was under criminal investigation, and that investigators informed him that he did not require union representation. He alleged that the U.S. attorney did not prosecute him because it was unclear whether he was a volunteer or a paid employee during the periods in question.

On an overpayment recovery questionnaire (Form OWCP-20) appellant indicated that his income was \$3,150.00. He indicated that his mortgage payment was \$1,633.84; his food expenses were \$450.00; his utilities were \$243.09; and his gas, cable, and cell phone costs were \$550.00. Appellant listed two credit cards with monthly payments of \$92.61 and \$65.00. He listed his assets as \$150.00 in cash; and \$450.00 in his checking account for a total of assets on hand as \$600.00.

By decision dated January 28, 2015, OWCP's hearing representative affirmed the forfeiture and overpayment in the amount of \$63,129.33 as appellant knowingly failed to report employment earnings and activities on his EN1032 forms. She found that the \$12,000.00 E.H. paid appellant was repayment of a loan. The hearing representative found that E.H. compensated appellant's work at the AFH by paying for his food and utility bills. She found that appellant's more recent statements regarding his 15-minute work at the AFH was inconsistent with what he reported to investigators and was not *de minimis*. The hearing representative noted that appellant failed to submit any evidence supporting his claim for difficulties with reading comprehension. She found that appellant's activities for E.H. constituted employment for which AFH would have had to pay someone else to perform and that he knowingly failed to report these earnings resulting in forfeiture. The hearing representative noted that OWCP utilized an incorrect date for the period of the forfeiture and overpayment and that the correct date was February 10, 2012 through September 10, 2013 with a resulting overpayment of \$63,129.33. She found that appellant was at fault in creating the overpayment as he made an incorrect statement as to a material fact. The hearing representative reviewed appellant's Form OWCP-20 and determined that appellant under-reported his salary as well as neglecting to report his \$12,000.00 in savings. She found that appellant could repay his debt at the amount of \$1,000.00 a month without severe financial hardship or defeating the purpose of FECA.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(b) of FECA provides in pertinent part:

"The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the time the Secretary specifies.... An employee who --

- (1) fails to make an affidavit or report when required; or
- (2) *knowingly omits* or understates any part of his earnings;

forfeits his right to compensation with respect to any period for which the affidavit or report was required."² (Emphasis added.)

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he "knowingly" failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a

² *Id.* at § 8106(b).

penalty provision, it must be narrowly construed.³ The term “knowingly” is defined within OWCP’s regulations as “with knowledge, consciously, willfully, or intentionally.”⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant forfeited his compensation benefits from February 10, 2012 through September 10, 2013 as he knowingly omitted earnings on EN1032 forms completed on October 16, 2012 and September 10, 2013. These forms cover the period from February 10, 2012, when appellant first received compensation benefits, through September 10, 2013, the date he signed the second Form EN1032. The first form covers from February 10 through October 16, 2012 and the second from June 10, 2012 through September 10, 2013.

The EN1032 forms of record clearly indicate that, if work was performed in furtherance of another’s business, the employee must show as the rate of pay what it would have cost the employer or organization to hire someone to perform the work performed. The Board has held that the test of what constitutes reportable earnings is not whether appellant received a salary, but what it would have cost to have someone else to do the work.⁵

Appellant informed investigators that he worked at the AFH until his surgery on March 7, 2012. He described his duties at that time as working every night after his employing establishment job, from 5:30 p.m. until 10:00 p.m. putting the patients to bed. Appellant also distributed breakfasts and lunches to the patients, and he got up in the middle of the night to clean patients or tend to them when they screamed. He also described his work after his December 2012 surgery as relieving an employee at 9:00 p.m., distributing medication and sitting in a chair until 11:00 p.m. when another employee would relieve him. At and after the oral hearing, appellant alleged that he passed out snacks and medication for no more than 15 minutes a day. The Board finds that these statements are not credible given appellant’s detailed accounting to the investigators, as well as his listing as an employee on the 2010, 2011, and 2013 state employee rosters by E.H.

On appeal counsel argues that the investigative report was not supported by signed affidavits or declarations and could not establish appellant’s alleged employment activities. This argument is not persuasive as OWCP, the hearing representative, and the Board were all able to review not only the investigative report, but also appellant’s recorded statements *via* the DVD’s. This additional evidence has weight beyond that of the mere investigative report.⁶ Counsel further argued that appellant worked beginning in 2006 and that his employment activities were dissimilar employment rather than earnings. The issue of concurrent and dissimilar earnings is not presented here. The Board has held that, in determining a claimant’s pay rate under 5 U.S.C.

³ *Anthony A. Nobile*, 44 ECAB 268, 271-72(1992).

⁴ 20 C.F.R. § 10.5(n); *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

⁵ *See Anthony Derenzo*, 40 ECAB 504 (1988); *see also Monroe E. Hartzog*, 40 ECAB 322 (1988) *B.S.*, Docket No. 09-0076 (issued September 30, 2009).

⁶ *But see D.O.*, Docket No. 13-1809 (issued September 11, 2014) (finding that an investigative report without a transcript is not sufficient to establish a finding of forfeiture).

§ 8114 earnings from a private-sector job are not combined with concurrent federal employment earnings if the private earnings are dissimilar.⁷ The present case does not involve concurrent federal employment earnings and a determination of pay rate under 5 U.S.C. § 8114. In this case, appellant had earnings from private employment and he is not entitled to compensation for total disability during the period worked.⁸ Counsel alleges that appellant's work was *de minimis* and was not required to be reported. The Board addressed this argument above noting that, while appellant and E.H. reported work of less than three to five hours a week at the oral hearing, this does not correlate to his initial recorded statements to investigators.⁹ Counsel further contented that appellant received repayment of a personal loan or return on investment income. OWCP's hearing representative found that the basis for the forfeiture was the failure to report on his EN1032 forms the amount it would have cost E.H. to pay someone to perform the tasks that appellant undertook at the AFH. Counsel finally argued that there was no evidence that appellant was listed as a staff member from February 9, 2012 through September 10, 2013 at the AFH. As noted above, appellant reported working for at least two hours a night at the AFH in December 2012. As the second Form EN1032 covers the 15-month period prior to September 10, 2013, the record establishes that appellant worked during this period at the AFH and therefore his failure to report this work on the form is what subjected him to the forfeiture provisions for the entire period.

These factual circumstances of record, together with appellant's certification to OWCP on EN1032 forms that he had no employment or earnings, provides persuasive evidence that appellant "knowingly" misrepresented and omitted his earnings and employment activities.¹⁰ OWCP, therefore, properly found that appellant forfeited his compensation for the periods covered by the October 16, 2012 and September 10, 2013 EN1032 forms.

LEGAL PRECEDENT -- ISSUE 2

Section 8106(b) of FECA provides that compensation forfeited under this subsection, if already paid, shall be recovered under section 8129 of this title unless recovery is waived under that section.¹¹

Section 10.529 of OWCP's regulations provide as follows:

"(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

⁷ See *Steven J. Rose*, 44 ECAB 211 (1992).

⁸ *D.H.*, Docket No. 16-0128 (April 8, 2016).

⁹ But see *S.G.*, Docket No. 11-0942 (issued April 4, 2012) (the Board has held that investment advice for three to five hours a week was *de minimis* and insufficient to establish forfeiture).

¹⁰ *Mamie L. Morgan*, 41 ECAB 661 (1990).

¹¹ 5 U.S.C. § 8106(b).

“(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. § 8129 [recovery of overpayments] and other relevant statutes.”¹²

ANALYSIS -- ISSUE 2

Appellant forfeited his compensation benefits from February 10, 2012 through September 10, 2013. OWCP’s hearing representative noted that OWCP had erroneously expanded the term of the forfeiture resulting in an inappropriately large overpayment. The Board finds that the hearing representative properly reduced the term of the forfeiture and commensurately reduced the amount of the overpayment to \$63,129.33, the total amount of compensation paid for the period subject to forfeiture. Appellant has not disputed the amount of the overpayment and the Board finds that he received an overpayment of \$63,129.33.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA¹³ provides that, where an overpayment of compensation has been made “because of an error or fact of law,” adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”¹⁴ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.433(a) of OWCP’s regulations¹⁵ provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

Failed to furnish information which he or she knew or should have known to be material; or

Accepted a payment which he or she knew or should have known was incorrect.”¹⁶

¹² 20 C.F.R. § 10.529.

¹³ 5 U.S.C. § 8129(a).

¹⁴ *Id.* at § 8129(b).

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *Id.*

ANALYSIS -- ISSUE 3

The finding of fault in this case was based on 20 C.F.R. § 10.433(a)(1), for making an incorrect statement regarding a material fact that appellant knew or should have known was incorrect. The incorrect statement was made on the EN1032 forms when appellant failed to report income.

As the Board explained in *L.M.*,¹⁷ by signing the EN1032 forms, appellant is deemed to have acknowledged his duty to fill out the forms properly, including the duty to correctly report earnings. His understatement or omission of earnings is an incorrect statement as to a material fact.¹⁸ Based on the forfeiture discussion above, it is established that appellant knew or should have known that the statement that he had no earnings was incorrect. The Board accordingly finds that he is properly found to be at fault and is not entitled to waiver.

With respect to the recovery of the overpayment, the Board notes its jurisdiction on appeal is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.¹⁹

CONCLUSION

The Board finds that appellant forfeited his right to his compensation benefits for the period February 10, 2012 through September 10, 2013 in the amount of \$63,129.33, that he was at fault in the creation of the overpayment, and that this overpayment is not subject to waiver of recovery.

¹⁷ Docket No. 12-0405 (issued October 1, 2012).

¹⁸ *Id.*; *G.G.*, Docket No. 14-1847 (issued January 9, 2015).

¹⁹ *D.R.*, 59 ECAB 148 (2007).

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board